

AUG - 1 1997

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket # 96-48
[REDACTED]

In the Matter of)

Request By ALTS For Clarification of the)
Commission's Rules Regarding Reciprocal)
Compensation for Information Service)
Provider Traffic)

CCB/CPD 97-30

MOTION TO ACCEPT REPLY COMMENTS ONE DAY LATE

Bell Atlantic and NYNEX respectfully ask the Commission to accept the attached Reply Comments of Bell Atlantic and NYNEX one day late. Because of unforeseen problems. Bell Atlantic's courier service was unable to deliver the pleading prior to the Commission's 5:30 p.m. closing.

Accordingly, Bell Atlantic and NYNEX request that the Commission accept the attached filing one day out of time. Because there are no further responsive pleadings in this proceeding, no party will be prejudiced by grant of this motion.

Respectfully Submitted,

William J. Balcerski, Esq.

William J. Balcerski
1095 Avenue of the Americas
Room 3723
New York, NY 10036
(212) 395-8148

Attorney for the NYNEX
Telephone Companies

Lawrence W. Katz

Lawrence W. Katz
1320 North Court House Road
Eighth Floor
Arlington, Virginia 22201
(703) 974-4862

Attorney for the Bell Atlantic
Telephone Companies

August 1, 1997

Number of Copies rec'd _____
List A B C D E

RECEIVED

AUG - 1 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Request By ALTS For Clarification of the)	
Commission's Rules Regarding Reciprocal)	CCB/CPD 97-30
Compensation for Information Service)	
Provider Traffic)	

REPLY COMMENTS OF BELL ATLANTIC¹ AND NYNEX²

The parties that claim that Internet access traffic is subject to the reciprocal compensation provisions of the 1996 Telecommunications Act,³ which apply only to local traffic, are wrong as a matter of law and sound public policy.

First, as a legal matter, Internet access traffic simply is not local traffic. As the Commission itself has repeatedly recognized, Internet access traffic is both interexchange in nature and predominantly interstate. Nothing in the Eighth Circuit's recent decision in *Iowa Utilities Board* changes that fact.⁴ On the contrary, in its decision in a parallel appeal, the

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.

² The NYNEX telephone companies ("NYNEX") are New York Telephone Company; and New England Telephone and Telegraph Company.

³ See 47 U.S.C. §§ 251(b)(5) and 252(d)(2).

⁴ *Iowa Utilities Board v. FCC*, No. 96-3321, 1997 WL 403401 (8th Cir. July 18, 1997).

Eighth Circuit recently upheld the Commission's authority to distinguish between local traffic, which is subject to reciprocal compensation, and interexchange traffic, which is not.⁵

Some parties, however, argue that the enhanced service provider ("ESP") exemption should be interpreted to treat Internet Service Providers ("ISPs") as end users for all purposes, including reciprocal compensation. But the Commission has made clear that while the ESP exemption serves to exempt ESPs (including ISPs) from paying interstate access charges, it does not change the nature of their traffic.

Second, as a policy matter, if Internet access traffic were subject to payment of reciprocal compensation, the originating carrier in many instances would be forced to pay the terminating carrier more than the originating carrier receives from the end user to provide local telephone service. This bizarre result would not only provide an unjustifiable windfall to the terminating carrier, but it also would deter local exchange carriers ("LECs") from marketing their service to customers who are large Internet users.

Finally, some parties argue that, without reciprocal compensation, they could not make money serving ISPs and would not compete to provide service to those customers. If this is true, the reason is not the lack of reciprocal compensation. Rather, it is the ESP exemption, which forces the LECs to charge below-cost local rates to provide terminating service to ISPs. But the solution to this problem is to repeal the ESP exception -- not to create further problems by subjecting ISP traffic to reciprocal compensation.

⁵ *Competitive Telecommunications Assoc. v. FCC*, No. 96-3604, 1997 WL 352284, *6, n.5 (8th Cir. June 27, 1997).

I. Internet Access Traffic Is Not Local and Is Not Subject to Reciprocal Compensation.

No party questions the conclusion that Internet traffic is interexchange in nature, and predominantly interstate, rather than local.⁶ That should decide the issue. The nature of the traffic is dictated not by the physical location of the communications facilities that carry the traffic but by the type of traffic flowing over those facilities.⁷ As the Commission confirmed in interpreting Section 251 of the Act, "Section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area."⁸

With precedent squarely against them, the parties attempt two collateral arguments, neither valid, in support of their claim that Internet traffic should nonetheless be treated as local. First, they cite the Commission's treatment of commercial mobile radio service ("CMRS") in the Local Competition Order, where the Commission applied reciprocal

⁶ Several advocates of reciprocal compensation admit the interstate nature of the communications. *See, e.g.*, Comments of AT&T at 2 ("AT&T") ("ISP traffic is overwhelmingly and inseparably interstate in nature"), Comments of Adelphia Communications Corporation, et al. at 5 ("Adelphia") ("[T]he Internet itself is jurisdictionally interstate. As a result, traffic to and from the Internet is also jurisdictionally interstate." (footnote omitted)), Comments of CompuServe Incorporated at 4 ("CompuServe") ("[T]he great preponderance of [Internet] information services traffic is jurisdictionally interstate as a matter of law.").

⁷ *See, e.g., North Carolina Util. Comm'n v. FCC*, 537 F.2d 787 (4th Cir 1976); *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir 1977); *California v. FCC*, 39 F.3d 919 (9th Cir. 1994).

⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499, ¶ 1034 (1996) (emphasis added) ("Local Competition Order"). Traffic bound for the Internet leaves the public switched telephone network altogether, is in no sense part of a service provided "within a telephone exchange," 47 U.S.C. § 3(47) (defining telephone exchange service), and is therefore inherently interexchange in nature.

compensation to certain CMRS calls.⁹ That provision, however, cuts against the parties' position. The Commission there invoked its jurisdiction over CMRS in Section 332(c)(3) of the Act to define CMRS traffic within an MTA as local. Based on this definition, the Commission held that "traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA ... is subject to transport and termination rates under section 251(b)(5) [i.e., reciprocal compensation] rather than interstate or intrastate access charges."¹⁰ CMRS traffic that does not terminate within an MTA, however, is not local and is not subject to reciprocal compensation.

Second, some parties assert that an Internet call is two separate services -- one a local telecommunications call that terminates at the ISP's premises and is subject to reciprocal compensation and the other an interstate/interexchange information service.¹¹ For more than a decade, the Commission has uniformly rejected similar arguments, both in connection with enhanced services traffic¹² and calls involving an intermediate reseller.¹³ Instead, it found that

⁹ Local Competition Order at ¶ 1043. *See, e.g.*, Adelphia at 20-21, CompuServe at 4-5. ALTS used the Commission's treatment of CMRS as a major argument in the request that led to this proceeding. Letter dated June 20, 1997 from Richard J. Metzger, Association for Local Telecommunications Services ("ALTS"), to Regina Keeney, Chief, Common Carrier Bureau, at 5.

¹⁰ Local Competition Order at ¶ 1043 (emphasis added).

¹¹ *See, e.g.*, Comments of America Online, Inc. at 7 ("AOL"), Comments of Cox Communications, Inc. at 9, Teleport at 4.

¹² *See MTS and WATS Market Structure*, 97 FCC 2d 682, 711-12 (1983) (Access Charge Order); *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, 7 FCC Rcd 1619 (1992).

¹³ *AT&T Communications, Revisions to Tariff F.C.C. No. 2 (800 ReadyLine Service)*, 2 FCC Rcd 78 (1986); *Teleconnect Company v. Bell Telephone Company of Pennsylvania*, 10 FCC Rcd 1626 (1995).

"[e]nhanced service providers, like facilities-based interexchange carriers and resellers, use the local network to provide interstate services."¹⁴ Accordingly, there is no legal basis for the parties' claim that Internet access services are local and subject to reciprocal compensation under the 1996 Act.

II. The ESP Exemption Merely Exempts ISPs from Paying
Interstate Access Charges, It Does Not Change the Nature of the Traffic.

A number of the parties claim the ESP exemption requires calls to an ISP to be treated as local calls for all purposes, including the reciprocal compensation provisions of Sections 251 and 252 of the Act.¹⁵ The exemption, however, only serves to exempt ESPs from the obligation to pay exchange access rates -- an obligation that would otherwise apply because of the interexchange nature of their traffic. As the Commission has explained, ISPs are treated as if they were end users, but only "for purposes of the access charge system."¹⁶ The Commission has uniformly applied the exemption narrowly and has not broadened it, as some parties claim, to treat ESPs (which include ISPs) as end users for any other purpose, nor should it. Neither the original policy basis for the exemption, to prevent a sudden increase in the cost of access that

¹⁴ *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking*, 2 FCC Rcd 4305, 4306, ¶ 7 (1987). *See, also Access Charge Reform, Notice of Proposed Rule Making*, CC Docket No. 96-262, FCC 96-488 at ¶¶ 282-90 (rel. Dec. 24, 1996), *First Report and Order*, FCC 97-158, ¶ 342 (rel. May 16, 1997) ("Access Charge Reform Order") (ESPs generally transmit interstate, not local, traffic).

¹⁵ *E.g.*, AT&T at 3-4, Comments of Brooks Fiber Properties, Inc. at 5, Comments of Teleport Communications Group Inc. at 7-8 ("Teleport").

¹⁶ *See* Access Charge Reform Order at ¶ 348.

could jeopardize a fledgling enhanced services industry,¹⁷ nor today's justification, to prevent ISPs from paying full access rates,¹⁸ justifies expanding the exemption.

III. Sound Public Policy Also Requires That Internet Access
 Traffic Not Be Subject To Reciprocal Compensation.

Contrary to some parties' claims, subjecting Internet access traffic to reciprocal compensation is contrary to sound public policy.

First, in many instances, the amount of reciprocal compensation that an originating carrier that charges a flat (non-usage) rate for local telephone service would be forced to pay to a carrier that provides terminating service to ISPs would exceed the monthly rate that the originating carrier receives from its end user customer. The sole result would be to provide a windfall to the terminating carrier at the expense of the originating carrier and its other customers -- a fact that has not gone unnoticed by many competing LECs ("CLECs") who have targeted their marketing at ISPs for this very reason.¹⁹

¹⁷ Access Charge Order at 715.

¹⁸ Access Charge Reform Order at ¶¶ 344-48.

¹⁹ As Bell Atlantic and NYNEX previously told the Commission, one company has informally told NYNEX that it could receive from \$14 million to \$28 million *per month* in reciprocal compensation revenues by serving ISPs and other ESPs through a single switch. *See* Joint Comments of Bell Atlantic and NYNEX on Notice of Inquiry, CC Docket No. 96-262 at n. 18 (filed March 24, 1997) ("NOI Comments").

A simple example makes the point. A residential customer who uses an ISP's service for an average of only two hours a day,²⁰ would generate a payment to the terminating carrier of \$18.00 per month.²¹ The originating carrier that provides local service to that residential customer, however, will receive a flat rate of only about \$13.00 per month on average to provide basic residential service -- a rate that often does not cover the cost of the service.²² Therefore, the originating carrier would not only have to turn over to the terminating CLEC in reciprocal compensation every penny of revenue it receives from its end user, but it would have to pay the CLEC an additional \$5.00 per month.²³ Not only would this produce an unjustifiable windfall for the terminating carrier, but by forcing the originating carrier and its other customers

²⁰ An October 1996 Georgia Tech survey showed that more than 50% of residential Internet customers remain connected for at least 10 hours per week and over 20% for more than 20 hours/week. This copyrighted study is available on the Internet at <http://www.cc.gatech.edu/gvu/user>. Given the extremely rapid growth of Internet usage, the comparable figures today likely would be higher.

²¹ This assumes a reciprocal compensation rate of 0.5 cents per minute, times the 3600 minutes the end user would generate (120 minutes/day x 30 days).

²² The weighted average flat-rated residential line rate in Bell Atlantic is \$13.14.

²³ Although some retail customers, such as credit card validation companies or pizza delivery stores, receive large volumes of terminating calls, they place far fewer demands on the local network than do ISPs. As the Commission has acknowledged, those customers' holding times are relatively short -- a few seconds or minutes -- while ISPs' services holding times are often measured in hours. *See* Access Reform Notice at ¶ 316. As Bell Atlantic and NYNEX have previously shown, ISPs are expected to generate about 25 *billion* minutes during 1997 and could exceed interexchange carrier minutes within a few years. *See* NOI Comments at 9. No party has contradicted those estimates.

to absorb the cost of serving the end user, it also would deter carriers from serving customers who are large Internet users in the first place.²⁴

Second, some parties claim that the failure to apply reciprocal compensation would mean that they could not make money on services to terminate traffic to ISPs and therefore would not compete to serve ISPs.²⁵ The reason they cannot make money has nothing to do with reciprocal compensation, however. It is a function of the ESP exemption. In order to win ISPs as customers, competing carriers would need to charge ISPs a rate that is equal to or less than the rate that the incumbent LEC charges. But that rate is limited by the ESP exemption which allows ISPs to pay only a flat rated end user charge (and to avoid paying any usage charges for the huge traffic volumes that they generate) at the terminating end. As one CLEC puts it, "[n]ormally, the cost incurred to terminate local calls to ISPs exceeds the local service revenue that can be charged for providing originating local exchange services."²⁶ In contrast, if the ESP exemption were repealed, so that the incumbent and competing LECs were both able to charge cost-based rates to provide terminating services to ISPs, a robust competitive market would develop.

²⁴ This result would be particularly bizarre given the direction of the traffic flow. Once the initial connection is established, the overwhelming flow of data over the connection is from the Internet to the end user. In this sense, the traffic actually originates within the Internet, flows through the ISP, and terminates with the end user. Under these circumstances, if reciprocal compensation applied, the only rational result would be for compensation to flow from the carrier serving the ISP to the carrier serving the end user -- not the other way around as the proponents of the reciprocal compensation would have it.

²⁵ *See, e.g.*, Adelphia at 8, AOL at 15, Comments of MCI Telecommunications Corporation at 4.

²⁶ Comments of American Communications Services, Inc. at 5.

Finally, contrary to the allegations of some parties,²⁷ requiring reciprocal compensation would retard, not stimulate, the development and implementation of innovative methods of Internet access. Just as the ESP exemption provides a disincentive for ISPs to embrace new technology, reciprocal compensation would keep CLECs tied to circuit-switched technology. To maintain their subsidies, CLECs would give ISPs every incentive to keep their service and not use an incumbent LEC's packet-switched Internet access network.²⁸ This has been the experience of Bell Atlantic in deploying its packet-switched Internet Protocol Routing Service ("IPRS"). Even though IPRS provides ISPs higher-quality data service than the circuit-switched voice network, not one major ISP has subscribed, because the artificially low rates they pay for the existing, less efficient service over the circuit-switched voice network are more cost-effective.

²⁷ *See, e.g.*, Intermedia Communications Inc. Comments in Support of ALTS Request for Letter Ruling at 5-6, AOL at 16, Adelphia at 10-11.

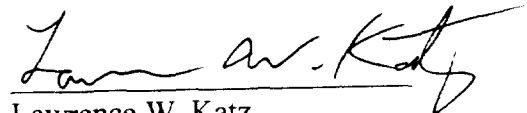
²⁸ Some CLECs, such as MFS/Worldcom, are affiliated with large ISPs (in this case, UUNET) and would receive subsidies from both the ESP exemption and reciprocal compensation.

IV. Conclusion

Accordingly, the Commission should find that Internet access traffic is not subject to reciprocal compensation.

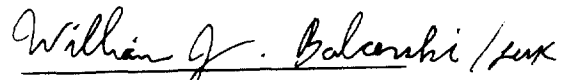
Respectfully submitted,

Edward D. Young, III
Michael E. Glover
Of Counsel


Lawrence W. Katz

1320 North Court House Road
8th Floor
Arlington, Virginia 22201
(703) 974-4862

Attorney for the Bell Atlantic
Telephone Companies


William J. Balcerski

1095 Avenue of the Americas
Room 3723
New York, New York 10036
(212) 395-8148

Attorney for the NYNEX
Telephone Companies

July 31, 1997